

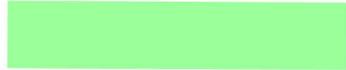


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JAN 31 2014 OFFICE: VERMONT SERVICE CENTER

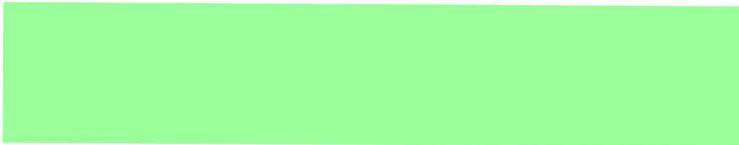


IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and the AAO dismissed the appeal. The petitioner filed a motion to reconsider. The motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a hotel established in 2011. In order to employ the beneficiary in what it designates as general manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the statutory and regulatory provisions. Thereafter, counsel for the petitioner submitted a Notice of Appeal or Motion (Form I-290B), indicating that he was submitting an appeal of the director's denial of the petition to the AAO. The AAO reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish eligibility for the benefit sought. The AAO dismissed the appeal.

The petitioner's counsel subsequently submitted another Form I-290B on January 3, 2014. As indicated by the check mark at Box E of Part 2 of the Form I-1290B, the petitioner filed a motion to reconsider. The motion before the AAO contains: (1) the Form I-290B; (2) a brief prepared by counsel; and (3) the AAO's decision dated December 2, 2013.

The AAO reviewed the record of proceeding in its entirety before issuing its decision. The AAO notes that the petitioner failed to comply with the regulatory filing requirements for motions to reconsider. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

(iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

* * *

(C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the petitioner and counsel failed to comply with the requirements as set by the regulations for properly filing a motion.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirement as stated at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this reason.

Although the motion will be dismissed for the petitioner's failure to comply with the filing requirements, the AAO nonetheless reviewed the motion, and finds that even if the petitioner had complied with the requirements of 8 C.F.R. § 103.5(a)(1)(iii)(C), the motion to reconsider would have nonetheless been dismissed for the reasons described below.

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. See 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.¹

In the instant case, although counsel states his disagreement with the prior decision, he does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. Counsel has not established that the decision was incorrect based on the evidence of record at the time of the decision. In short, the petitioner and counsel have not submitted any evidence that would meet the requirements of a motion to reconsider.

In the instant case, counsel states that the AAO's decision should be reversed, but has not submitted any document that would meet the requirements of a motion to reconsider. A motion to reconsider

¹ The provision at 8 C.F.R. § 103.5(a)(3) states the following:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

that merely expresses disagreement with the AAO's application of the law to the facts in a specific case is not persuasive to establish that law or policy was improperly applied. As previously noted, such an argument must be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. In the instant case, the documents submitted on motion do not establish that the decision was based on an incorrect application of law or USCIS policy. The petitioner and counsel have thus failed to comply with the requirements of a motion to reconsider. Therefore, had the motion to reconsider been properly filed, it would nonetheless be dismissed for this reason.

As previously discussed, the instant motion does not meet the applicable filing requirement. Accordingly, it must be dismissed. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

It should be noted for the record that, unless USCIS directs otherwise, the filing of a motion does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.